In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1757

HEATH TEC DIVISION/SAN FRANCISCO,
a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner Heath Tec Division/San Francisco, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit enforcing a decision and order of the National Labor Relations Board.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 566 F.2d 1367 and appears at Appendix A, *infra,* pp.

1-12. The Decision and Order of the National Labor Relations Board is reported at 222 NLRB 981 and appears at Appendix B, pp. 13-27.

JURISDICTION

The Opinion of the Court of Appeals was filed on January 5, 1978. A timely petition for rehearing was denied on March 15, 1978. Federal jurisdiction herein is predicated upon Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. §151, *et seq.*). Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board (hereinafter called "the Board") denies administrative due process when it relies upon an administrative regulation to revoke subpoenas *duces tecum* addressed to Board personnel without finding that the evidence sought is privileged, thereby denying the party seeking the evidence its only means of proving objections to the conduct of a representation election.

2. Whether the Board violates the federal policy expressed in the Government Organization and Employees Act and in the Freedom of Information Act

when it refuses to disclose information obtained in connection with investigation of an unfair labor practice charge which is later dismissed, but makes no showing of need for nondisclosure.

3. Whether the Board violates its own standards of due process and fairness when it refuses to set aside an election on the basis of uncontested substantial evidence of third party misconduct and a *prima facie* showing of irregularities in the Board's handling of the election, where the Board has barred access by the objecting party to the only evidence which would substantiate said irregularities.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Sections 7 and 9(c) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*, reprinted in Appendix C, *infra*, pp. 28-29; the United States Constitution, Amendment V, Due Process clause, which provides as follows:

> "No person shall be . . . deprived of life, liberty, or property without due process of law. . . .";

the Freedom of Information Act, 80 Stat. 383, 81 Stat. 54, 88 Stat. 1561-1564, 90 Stat. 1247, 5 U.S.C. §552, reprinted in Appendix D, *infra*, pp. 31-41; and the Government Organization and Employees Act, 80 Stat. 379, 5 U.S.C. §301, reprinted in Appendix E, *infra*, p. 42.

This case also involves Section 102.118 of the Board's Rules and Regulations, Series 8, as amended (29 C.F.R. §102.118), and Section 101.20 of the Board's Statements of Procedure (29 C.F.R. §101.20), reprinted respectively in Appendix F, *infra,* pp. 43-47, and Appendix G, *infra,* pp. 48-49.

STATEMENT OF THE CASE

A. The Deportation Rumors and the Representation Election.

Pursuant to stipulation of the parties, a representation election was scheduled to be held in a unit of production and maintenance employees at Petitioner's Hayward, California production facility on April 19, 1974 (R. 6, 113-115). A few days prior to the election Petitioner learned that deportation threats were circulating at its plant, where many of the employees were Mexican nationals (Tr. 72-75). On April 12, 1972 Petitioner filed with Region 20 of the Board an unfair labor practice charge based on the threats directed at its Mexican employees (Employer Exh. 1; Tr. 73-75, 104) and simultaneously asked the Regional Director to postpone the election indefinitely (Employer Exh. 3; Tr. 78-80).

On April 17, 1974 two Board agents came to Petitioner's plant to interview employees concerning the deportation threats (Tr. 78-81). After the interviews were concluded, one of the Board agents, a Mr. Edward Kaplan, told Petitioner's attorney, "There is no doubt that it is going around out there [pointing to the production area of the plant] that if the employees don't vote for the Union they will be deported. But I cannot connect it to the Union."[1]

On April 18 the Regional Director for Region 20 dismissed Petitioner's unfair labor practice charge and rejected its request for a postponement of the election (Employer Exh. 6; Tr. 98-99). The election was held the following day as scheduled (R. 122).

B. Petitioner's Objections to the Election.

On April 26, 1974, Petitioner filed timely objections to the conduct of the election (R. 125-131). Region 20 thereafter recommended that Petitioner's objections be overruled in their entirety (R. 132-138). Petitioner filed exceptions with the Board in Washington, D.C. (R. 139-144, 145-162) and on December 16, 1974, the Board ordered Region 20 to grant a hearing, holding that substantial and material factual issues had been raised with respect to the following objections (R. 163-165):

> "15. The Union by its representatives, agents, and/or persons closely allied therewith acting with the consent and/or approval of the Union, coerced, threatened and intimidated Spanish-speaking employees of the Employer by representing to said employees that unless said employees supported the Union and voted for the Union in the election that the Union and/or its agents would harass the employees by having their immigration papers revoked with the consequence that they would lose their employment and be expelled from the United States.

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[1]The Union was International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115.

"16. Third persons coerced, threatened and intimidated Spanish-speaking employees of the Employer by representing to said employees that unless said employees supported the Union and voted for the Union in the election that the Union and/or its agents would harass the employees by having their immigration papers revoked with the consequence that they would lose their employment and be expelled from the United States with the consequence that necessary and essential laboratory conditions were destroyed.

"17. The National Labor Relations Board with conclusive knowledge, resulting from an NLRB investigation at the Employer's premises at which employees were interviewed by NLRB agents, that rumors were widespread among the employees that unless the employees voted for the Union their immigration papers would be examined and they would be expelled from the United States, proceeded to conduct the representation election thereby interfering with the election process and the rights of employees to a fair and free election conducted in an atmosphere free from coercion, threats and intimidation.

"18. The National Labor Relations Board had actual knowledge, received through an NLRB investigation at the Employer's facility and from employee interviews conducted by NLRB agents, that the necessary laboratory conditions essential to a valid representation election were not present, but completely destroyed at the Employer's facility. With such knowledge, the National Labor Relations Board proceeded to conduct the representation election thereby depriving employees of a fair and free election conducted in an at-

mosphere free from coercion, threats and intimidation." (Objections to Conduct of Election and Conduct Affecting Results of Election, R. 125, 127-128.)

In order to substantiate Objections 17 and 18 concerning the conduct of Region 20 in proceeding with the election despite its knowledge that the necessary "laboratory conditions" were imperiled, Petitioner served Roy Hoffman, Regional Director for Region 20, and Edward Kaplan, field agent in charge of the investigation at Petitioner's plant prior to the election, with subpoenas *duces tecum*. The subpoenas required the testimony of Kaplan and Hoffman and the production of affidavits and statements of witnesses and other documents in the closed unfair labor practice file reflecting the final opinion of the Regional office regarding the deportation rumors (Board Exhs. 6, 7, 8 and 9).

The hearing on objections took place on January 20, 1975 (Tr. 7, R. 195). Petitioner produced two witnesses to establish that a deportation threat was being circulated among its employees and to place in issue the information and knowledge possessed by Region 20 (Tr. 10-11, 15, 20-29, 35-43, 57-63).

After Petitioner's witnesses completed their testimony, Petitioner called field agent Kaplan as a witness. Counsel for Region 20 immediately offered petitions to revoke the subpoenas *duces tecum* on behalf of Mr. Kaplan and Regional Director Roy Hoffman (Board Exhs. 11 and 12; Tr. 129-130). The

hearing officer granted the petitions to revoke, expressly and solely on the basis of Section 102.118 of the Board's Rules and Regulations (29 C.F.R. §102.118; Tr. 137-139).

On March 17, 1975 the hearing officer recommended that the Employer's Objections Nos. 15, 16, 17 and 18 be overruled (R. 187-195). In his Report and Recommendations the hearing officer found that Objections 17 and 18 could not be sustained because Petitioner had *presented no testimony or evidence* that Region 20 had actual and/or conclusive knowledge that deportation threats were circulating at its facility prior to the election (R. 187).

Petitioner filed timely exceptions to the hearing officer's Report and Recommendations, but on July 30, 1975 the Board adopted the hearing officer's findings and recommendations without comment (R. 196-242).

C. The Unfair Labor Practice Proceedings.

Following certification of the Union (R. 246), the Employer refused to bargain with the Union for the sole purpose of obtaining judicial review of the Board's decision. The Union subsequently filed unfair labor practice charges against the Company (R. 247). On October 9, 1975 the General Counsel issued a complaint and notice of hearing (R. 248-250), alleging that Petitioner refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (29 U.S.C. §158(a)(1)(5)) (Tr. 251-254).

Following a motion for summary judgment filed by the General Counsel on November 26, 1976 (R. 255-262), the Board transferred the proceedings to Washington, D.C. On February 20, 1976 the Board issued its Decision and Order granting the General Counsel's motion for summary judgment, affirming the rulings in the representation case and refusing to reverse the hearing officer's decision to quash the subpoenas *duces tecum* served upon the Board's personnel. The Board further found that Petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union pursuant to the Board's certification.

D. The Decision of the Court of Appeals.

The Court of Appeals enforced the Board's order to bargain. The Court held that the hearing officer erred by failing to make an independent evaluation of privilege before granting Region 20's petitions to revoke the subpoenas *duces tecum* served upon Board personnel. However, the Court concluded that Petitioner had not shown the error to be prejudicial because it was incumbent upon Petitioner to try to prove its case without resort to "privileged evidence" (Appendix A, p. 9). The Court further held that Petitioner "certainly cast some doubt on the existence of true laboratory conditions at the plant" at the time of the election, but that the record did not show "that there existed a significant impairment of the election process" (Appendix A, p. 10).

REASONS FOR GRANTING THE WRIT

This case presents important issues of first impression with regard to (1) the due process implications of the NLRB's refusal to disclose, to a party to a representation proceeding, relevant and material evidence within its exclusive possession, as to which no finding of privilege has been made; and (2) the Board's application of its laboratory standards for representation elections in the context of an election tainted by third party misconduct.

1. The Decision of the Court of Appeals Sustaining the Board's Revocation of the Subpoenas Duces Tecum Conflicts with the Requirements of Due Process of Law.

It is well established that the proceedings of administrative agencies, including the NLRB, must satisfy the "fundamentals of fair play" and the "'pertinent demands of due process.'" *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143-144 (1940); *International Tel. & Tel. Corp. v. Local 134*, 419 U.S. 428, 448 (1975) ("The [National Labor Relations] Board's procedures are, of course, constrained by the Due Process Clause of the Fifth Amendment * * *."); *Communist Party of U.S. v. Subversive Act. Con. Bd.*, 254 F.2d 314, 327 (D.C. Cir. 1958); *Harvey Aluminum (Incorporated) v. N.L.R.B.*, 335 F.2d 749, 753 (9th Cir. 1964). Due process and fair play require that "interested parties be afforded an opportunity for hearing and the judgment * * * express a reasoned conclusion." *Federal Communications Commission v. Pottsville Broadcasting Co., supra*, 309 U.S. at 143-144; *McClain Industries,*

Inc. v. N.L.R.B., 381 F.Supp. 187, 190 (E.D. Mich. 1974), *rev'd on other grounds*, 521 F.2d 596 (6th Cir. 1974) ("opportunity to obtain a fair hearing basic to due process").

The right to a fair hearing includes "the right to produce evidence * * * material to the issue." *National Lab. Rel. Bd. v. Indiana & M. E. Co.*, 318 U.S. 9, 28 (1943); *N.L.R.B. v. Bata Shoe Company*, 377 F.2d 821, 826-827 (4th Cir. 1967), *cert. denied*, 389 U.S. 917 (1967); *Barrus Construction Company v. N.L.R.B.*, 483 F.2d 191, 194 (4th Cir. 1973); *Firestone Synthetic Fibers Company v. N.L.R.B.*, 374 F.2d 211, 214 (4th Cir. 1966) (Board "must accept the burden of producing more evidence than might otherwise be necessary" if it limits discovery by the employer). The Board's refusal to hear evidence supportive of the employer's position is prejudicial, where on the basis of that evidence the employer "might" have been able to substantiate its theory of the case. *Hagopian & Sons, Inc. v. N.L.R.B.*, 395 F.2d 947, 953 (6th Cir. 1968); *N.L.R.B. v. U. S. Sonics Corporation*, 312 F.2d 610, 614 (1st Cir. 1963).

In granting Petitioner a hearing on its Objections Nos. 17 and 18, alleging administrative irregularities and procedural deficiencies in the conduct of the election, the Board found specific evidence of the existence of substantial and material issues concerning interference with the election, which if resolved in Petitioner's favor would warrant setting aside the election, independently of any other ground for objection. See, *e.g., Alpers' Jobbing Co., Inc. v.*

N.L.R.B., 547 F.2d 402, 405 (8th Cir. 1976) *cert. denied*, 46 U.S.L.W. 3219 (1977); *Electronic Components Corp. of N.C. v. N.L.R.B.*, 546 F.2d 1088, 1092 (4th Cir. 1976); *Alson Mfg. Asso. Div. of Alson Indus., Inc. v. N.L.R.B.*, 523 F.2d 470, 472 (9th Cir. 1975); *N.L.R.B. v. Newton-New Haven Company*, 506 F.2d 1035, 1036 (2d Cir. 1974).

Objections Nos. 17 and 18 addressed the suppression of evidence within the Board's possession concerning deportation rumors at Petitioner's facility, and the Board's decision to proceed with the election in spite of that evidence. Petitioner had the burden of proof on its objections. *N.L.R.B. v. Mattison Mach. Works*, 365 U.S. 123 (1961); Rules and Regulations of the National Labor Relations Board, Section 102.69(a), 29 C.F.R. §102.69(a). However, Petitioner had no means of proving the objections except through the testimony of the Board agents charged with investigating the deportation rumors and making the determination whether to proceed on the unfair labor practice charge, and the factual affidavits, reports and opinions concerning those rumors on which the Board based its decision not to issue a complaint on Petitioner's unfair labor practice charge.[2] Had Petitioner attempted to establish what

[2]The Court of Appeals failed to distinguish between Objections 15 and 16, which alleged Union circulation of the deportation rumors prior to the election, and Objections 17 and 18, which alleged election interference by Board personnel, when it asserted that Petitioner "missed several opportunities to present a stronger case" *without* the evidence sought by subpoena *duces tecum*. While Petitioner had access to evidence, and did in fact present testimony, in support of Objections 15 and 16, its evidence and witnesses would have been incompetent to prove Objections 17 and 18. At another point in its opinion, the Court implicitly recognized the distinction when it noted that by granting a hearing "the Board placed in issue the evidence that had been before Region 20 and its knowledge thereof"; and that Petitioner attempted to call Board Agent Kaplan as a witness "for the purpose of directly establishing Region 20's knowledge of the deportation rumors" (Appendix A, pp. 4, 7).

the Board agents knew about the deportation rumors by interviewing its employees to find out whether they gave statements to Board agents and what they said, Petitioner would have run afoul of another NLRB rule. In *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), *enf. denied on other grounds*, 344 F.2d 617 (8th Cir. 1965), the Board held that an employer may not question its employees concerning statements given to Board agents:

> "In defining the area of permissible inquiry, the Board has generally found coercive, and outside the ambit of privilege, interrogation concerning statements or affidavits given to a Board agent." *Johnnie's Poultry Co., supra*, 146 NLRB at 775.

The Board has continued to adhere to this rule. *See, e.g., Daybreak Lodge Nursing & Convalescent Home, Inc.*, 230 NLRB No. 127 (1977); *Jack August Enterprises, Inc.*, 232 NLRB No. 138 (1977); *Sinclair Glass Co.*, 188 NLRB 362 (1971), *enf'd*, 465 F.2d 209 (7th Cir. 1972). Thus, the Board's rules deprived Petitioner of the only direct evidence in support of Objections 17 and 18—the testimony and records of Board personnel—and at the same time prevented Petitioner from developing hearsay evidence on these objections through the questioning of its employees.

The hearing officer's improper revocation of the subpoenas effectively denied Petitioner a hearing on two of its four objections to the election, in violation not only of due process but also of the Board's own procedural rules. Had Petitioner been allowed to proceed on the duly issued subpoenas *duces tecum,* it might well have established independent grounds for setting aside the election, apart from the grounds (Objections Nos. 15 and 16) on which Petitioner did present evidence at the hearing. The evidence sought unquestionably existed and was reliable and probative. Cf. *J. H. Rutter Rex Manufacturing Co., Inc. v. N.L.R.B.,* 473 F.2d 223, 235 (5th Cir. 1973); *Stephens Produce Co., Inc. v. N.L.R.B.,* 515 F.2d 1373, 1377 (8th Cir. 1975). The Board's Statements of Procedure require that the parties to a representation hearing be "afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions." 29 C.F.R. §101.20(c). Representation hearings, unlike unfair labor practice trials, are nonadversary, and the hearing officer's role is "to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case." 29 C.F.R. §101.20(c). In this case, however, the hearing officer's revocation of the subpoenas *duces tecum* denied Petitioner the opportunity to produce the "significant facts" supporting its objections.

The Court of Appeals held that Petitioner was not prejudiced by the hearing officer's error in revoking the subpoenas *duces tecum* on the basis of the Board's

administrative regulation. But it also observed that had it been "called upon originally to pass on the merits" of the case it

> "might well have set aside the election, since the claims of Heath Tec, *although not fully substantiated,* certainly cast some doubt on the existence of true laboratory conditions at the plant." [Emphasis added.] (Appendix A, p. 11.)

Thus, the Court of Appeals recognized that Petitioner's claims might have warranted setting aside the election had additional evidence to substantiate them been available. Certainly the testimony and documents which Petitioner unsuccessfully sought through the subpoenas were "important" to proving its claims. According to the Court of Appeals' observation, the case was close. In view of the closeness of the case and the importance of the evidence sought, the hearing officer's error was prejudicial. *Harvey Aluminum (Incorporated) v. N.L.R.B., supra,* 335 F.2d at 755-756 ("The case was closely contested, and the testimony of these witnesses was unquestionably important"); *Braniff Airways, Incorporated v. C.A.B.,* 379 F.2d 453, 467 (D.C. Cir. 1967) ("whether an agency's error is prejudicial may turn on whether the case was 'close' "). Further, when, as here, basic procedural rights are involved, the error cannot be viewed as harmless. See, *Yiu Fong Cheung v. Immigration & Nat. Serv.,* 418 F.2d 460, 464 (D.C. Cir. 1969).

2. The Revocation of the Subpoenas Duces Tecum Prejudiced Petitioner by Denying It Access to Information and Records in Violation of Its Rights Under 5 U.S.C. §301.

The Government Organization and Employees Act, Title 5, Section 301 of the United States Code (5 U.S.C. §301) authorizes the head of an executive department to prescribe regulations for the governance of the department "and the custody, use, and preservation of its records, papers, and property." However, Section 301 expressly does not authorize "withholding information from the public or eliminating the availability of records to the public." 5 U.S.C. §301. Section 301 (formerly Section 22) governs proceedings under the National Labor Relations Act. *N.L.R.B. v. Capitol Fish Company,* 294 F.2d 868 (5th Cir. 1961). Cf. *General Engineering, Inc. v. N.L.R.B.,* 341 F.2d 367, 374-375 (9th Cir. 1965).

The Board's refusal to allow its personnel to testify under subpoena on the sole basis of its own administrative regulation (29 C.F.R. §102.118) violates Section 301 unless the record discloses that a privilege exists. *N.L.R.B. v. Capitol Fish Company, supra.* In the instant case, neither the Board nor the Court of Appeals determined that the information withheld by the Board was privileged, nor articulated a basis for a claim of privilege. The Court of Appeals simply assumed that the Board had at some point claimed a privilege for its investigative files. The Court itself did not determine from the record whether a privilege covered the information sought by Petitioner, and it ignored entirely the

fact that that information consisted of facts and opinions generated by Region 20's investigation of Petitioner's own defunct unfair labor practice charge. The Board's sweeping denial of disclosure, sustained by the Court of Appeals, contravened Section 301. 5 U.S.C. §301.

Further, the Board waived any privilege which may have attached to the subpoenaed witnesses and records when it ordered a full evidentiary hearing on the issue of whether Region 20 acted improperly in conducting the election in view of the statements, documents, and information within its possession. See, *N.L.R.B. v. Schill Steel Products, Inc.,* 408 F.2d 803, 805 (5th Cir. 1969).

3. The Court of Appeals' Decision Violates Federal Policy by Upholding the Nondisclosure of Information Which Would Have Been Available to Petitioner Pursuant to the Freedom of Information Act.

The Freedom of Information Act, 5 U.S.C. §552, requires federal agencies, including the Board, to make available to the public, *inter alia*, "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases . . ." 5 U.S.C. §552(a)(2)(A).[3] In *N.L.R.B. v. Sears, Roebuck & Co.,* 421 U.S. 132 (1975), this Court held that "final opinions" disclosable under the FOIA

[3]Pursuant to the Freedom of Information Act, Section 102.117 of the NLRB's Rules and Regulations (29 C.F.R. §102.117) makes available to the public for inspection and copying "all final opinions and all orders made by the Board in the adjudication of cases" and "[o]pinions and orders made by Regional Directors in the adjudication of representation cases pursuant to the delegation of authority from the Board."

include the NLRB General Counsel's memoranda explaining decisions not to file a complaint based on an unfair labor practice charge. *Sears* held that the FOIA Exemption 5 (5 U.S.C. §552(b)(5)) exempts from disclosure "those documents, and only those documents, normally privileged in the civil discovery context." *N.L.R.B. v. Sears, Roebuck & Co., supra,* 421 U.S. at 149. Memoranda "which conclude that no complaint should be filed and which have the effect of finally denying relief to the charging party" are disclosable under the FOIA, and not protected by Exemption 5. *N.L.R.B. v. Sears, Roebuck & Co., supra,* 421 U.S. at 155.

In *Robbins Tire & Rubber Co. v. N.L.R.B.,* 563 F.2d 724, 735 (5th Cir. 1977), *cert. granted,* 46 U.S.L.W. 3526 (1978), the Fifth Circuit held that FOIA Exemption 5 does not protect "purely factual material such as verbatim witness statements." Nor does Exemption 5 exempt from disclosure such factual material as affidavits and interview notes taken by Board personnel. *Electri-Flex Co. v. N.L.R.B.,* 412 F.Supp. 698, 703 (N.D. Ill. 1976). See, *Environmental Protection Agency v. Mink,* 410 U.S. 73, 91 (1973).

FOIA Exemption 7 protects from disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would", *inter alia,* "(A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of

personal privacy, (D) disclose the identity of a confidential source * * *." 5 U.S.C. §552(b)(7). The courts have consistently construed Exemption 7 to apply to Board investigative material only so long as an enforcement proceeding "is in progress or reasonable imminent." See, *Harvey's Wagon Wheel, Inc. v. N.L.R.B.,* 550 F.2d 1139, 1141 (9th Cir. 1976); *New England Medical Center Hosp. v. N.L.R.B.,* 548 F.2d 377 (1st Cir. 1976); *Robbins Tire & Rubber Co. v. N.L.R.B., supra.*

The evidence which Petitioner sought pursuant to subpoenas *duces tecum* is the type of factual information to which Petitioner would have been entitled under the FOIA, even without a showing of need. See, *Robbins Tire & Rubber Co. v. N.L.R.B., supra,* 563 F.2d at 734. The documents described in the subpoenas included witness statements, interview notes and opinions of the Regional Office of the Board concerning the decision not to proceed on Petitioner's unfair labor practice charge. The unfair labor practice case was long closed when the hearing officer revoked the subpoenas in the representation proceeding. There were no pending enforcement proceedings to which the documents pertained, such that disclosure could have interfered with the Board's procedures; accordingly, "fuller discovery" should have been allowed Petitioner. *Deering Milliken, Inc. v. Irving,* 548 F.2d 1131, 1135 (4th Cir. 1977).

4. The Court of Appeals' Decision Refusing to Set Aside the Election Conflicts with Decisions of Other Circuits Setting Aside Elections on the Basis of Board Misconduct.

The aim of a Board election is to determine the uninhibited choice of the employees as to whether they desire to be represented by a union in collective bargaining with their employer. The Board's obligation is to insure that this goal is fulfilled by providing an election atmosphere which is free from threats, coercion or misrepresentation likely to affect the employees' choice. If the requisite laboratory conditions are not maintained, it becomes the Board's obligation to direct a new election. *General Shoe Corporation,* 77 NLRB 124, 127 (1948); *Sewell Manufacturing Company,* 138 NLRB 66, 70 (1962). Courts have refused to allow the Board to ignore these standards for the conduct of a fair election. *Gallenkamp Stores Co. v. N.L.R.B.,* 402 F.2d 525 (9th Cir. 1968); *N.L.R.B. v. Georgetown Dress Corp.,* 537 F.2d 1239 (4th Cir. 1976).

The Court of Appeals concluded from its review of the record that:

> "the claims of Heath Tec, although not fully substantiated, certainly cast some doubt on the existence of true laboratory conditions at the plant." (Appendix A, p. 11.)

But the Court refused to set aside the election on the basis of third-party misconduct—circulation of the deportation rumors—in the absence of proof of "significant impairment" of the election process. Yet Petitioner's objections addressed *Board misconduct* as well, although the Board's revocation of the subpoenas

duces tecum prevented Petitioner from "fully substantiating" those objections.

The Court of Appeals' apparent application of a higher standard of proof—"significant impairment"—to all four of Petitioner's objections conflicts with the decisions of other Circuits and of the Board itself, which have consistently invalidated elections where *the actions of Board personnel* cast doubt on the existence of laboratory conditions. See, *Provincial House, Inc. v. N.L.R.B.,* 568 F.2d 8, 11 (6th Cir. 1977); *Delta Drilling Company v. N.L.R.B.,* 406 F.2d 109 (5th Cir. 1969); *N.L.R.B. v. Bata Shoe Company, supra; Glacier Packing Co., Inc.,* 210 NLRB 571 (1974). The rationale of these decisions is that the Board and its personnel must avoid even the *appearance* of partiality or unfairness in the conduct of the election. Doubts having clouded the election process here, the election should have been set aside.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,
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(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals,
Ninth Circuit.

No. 76-1884.

National Labor Relations Board,
Petitioner,

v.

Heath Tec Division/San Francisco,
Respondent.

[Jan. 5, 1978]

Petition for Enforcement of an Order of the National Labor Relations Board.

Before: MERRILL and GOODWIN, Circuit Judges, and NEILSEN,* District Judge.

NIELSEN, District Judge:

The National Labor Relations Board petitions this court to enforce its order issued against respondent Heath Tec Division/San Francisco for refusing to bargain with a certified union in violation of §§ 8(a)(1) and (5) of the National Labor Relations Act, as

*Honorable Leland C. Nielsen, United States District Judge, for the Southern District of California, sitting by designation.

amended 29 U.S.C. §§ 158(a)(1) and (5).[1] We find the Board's Decision and Order[2] does not deny respondent administrative due process and is supported by substantial evidence; therefore, we order enforcement.

I

The facts underlying the Board's findings and conclusions are as follows. After two prior representation elections had been set aside, on April 19, 1974, an election was held in a unit of production and maintenance employees pursuant to stipulations between Heath Tec and the Union.[3] The election was by secret ballot under the direction and supervision of the Regional Director of the N.L.R.B. for Region 20.

On April 26, 1974, Heath Tec filed twenty-one objections[4] alleging that acts by the Union and third persons interfered with a free and fair election and required the setting aside of the Union's election victory. On August 21, 1974, following an investigation of the objections and consideration of Heath Tec's supporting evidence, the Acting Regional Director

[1]29 U.S.C. § 158(a) provides in relevant part:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • • • • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

[2]The Board's order is reported at 222 N.L.R.B. No. 151 (1976).

[3]The union involved here is the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115.

[4]By letter of May 9, 1974, Heath Tec withdrew three of the objections.

issued a report, recommending that all objections be overruled. Heath Tec timely filed exceptions to the report and requested either another election or a hearing.

On December 16, 1974, the Board ordered a hearing limited to four specific objections which alleged (1) threats and rumors of deportation for any employees who voted against the Union and (2) the Regional Director's knowledge thereof. After conducting a hearing on January 20, 1975, the Hearing Officer issued a report, recommending that the four objections be overruled. Heath Tec filed with the Board objections to the report and a supporting brief. Heath Tec repeated its contentions with respect to the deportation rumors and further claimed that it was denied due process by suppression of evidence in that the Hearing Officer's revocation of Heath Tec's *subpoenas duces tecum* (directing certain N.L.R.B. personnel to testify and produce investigative files) deprived it of the only evidence as to the Region's knowledge of the deportation threats.

On July 30, 1975, after considering the relevant reports, exceptions, and briefs, the Board adopted the findings and recommendations of the Acting Regional Director and Hearing Officer. Consequently, the results of the April, 1974 election were final,[5] and on August 28, 1975, the Union was certified.

Shortly thereafter the Regional Director issued a complaint alleging that on September 11, 1975, Heath

[5]The results of the election were 13 votes cast for the Union, 7 against, and 1 undetermined challenged ballot.

Tec refused to bargain with the Union in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended 29 U.S.C. §§ 158(a)(1) and (5).[6] Heath Tec admits refusing to bargain for the sole purpose of obtaining judicial review. Accordingly, summary judgment was entered against respondent in an order of the Board dated February 20, 1976,[7] and it is this order which the Board petitions this court to enforce.

The scope of our review is limited. If the findings of the National Labor Relations Board are supported by substantial evidence on the record considered as a whole, they are conclusive; and so long as the Board did not misapply the law, the order is to be affirmed. National Labor Relations Act Section 10(e), as amended 29 U.S.C. § 160(e); *Portland Willamette Co. v. N.L.R.B.*, 534 F.2d 1331, 1334 (9th Cir. 1976).

II

When the Board ordered the January 20, 1975, representation hearing on deportation rumors, in order to determine whether the decision to continue with the election of April 19, 1974, was proper, the Board placed in issue the evidence that had been before Region 20 and its knowledge thereof. Hoping to obtain this evidence, Heath Tec served Regional Director Hoffman (director for Region 20) and Field Agent Kaplan (agent in charge of the investigation

[6] *See* note 1 *supra*.

[7] *See* note 2 *supra*.

of the deportation rumors at Heath Tec's plant prior to the election) with *subpoenas duces tecum* requiring their testimony and production of records. Heath Tec also requested the Board's General Counsel to consent to the subpoenaed testimony and documents, pursuant to Rule 102.118 of the Board's Rules and Regulations, 29 C.F.R. § 102.118.[8] The General Counsel denied

[8] 29 C.F.R. § 102.118 provides in pertinent part:

(a) Except as provided in section 102.117 of these rules respecting requests cognizable under the Freedom of Information Act, no regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a *subpoena duces tecum* or otherwise, without the written consent of the Board or the chairman of the Board if the document is in Washington, D.C., and in control of the Board, or of the general counsel if the document is in a regional office of the agency or is in Washington, D.C., and in the control of the general counsel. Nor shall any such person testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission or other administrative agency of the United States, or of any State, territory, or the District of Columbia, or any subdivisions thereof, with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or the general counsel, whether in answer to a subpoena or otherwise, without the written consent of the Board or the chairman of the Board if the person is in Washington, D.C., and subject to the supervision or control of the general counsel. A request that such consent be granted shall be in writing and shall identify the documents to be produced, or the person whose testimony is desired, the nature of the pending proceeding, and the purpose to be served by the production of the document or the testimony of the official. Whenever any *subpoena ad testificandum* or *subpoena duces tecum*, the purpose of which is to adduce testimony or require the production of records as described hereinabove shall have been served on any such person or other officer or employee of the Board,

Heath Tec's request based on the recognized privilege of preserving the confidentiality of investigative files, but stated that the denial did not preclude a renewal of the request at the hearing if necessity could be established.

At the hearing on January 20, 1975, Heath Tec presented only two witnesses. Mr. Rodriguez, a company supervisor, testified about vague rumors he had heard from employees whose names he could not remember. Furthermore, portions of his testimony conflicted with an earlier affidavit of his. Consequently, although aware of the alleged rumors, the Hearing

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he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, moved pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule. (b)(1) Notwithstanding the prohibitions of paragraph (a) of this section, after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the trial examiner shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

* * * * * *

(c) The provisions of subsection (b) of this section shall also apply after any witness has testified in any postelection hearing pursuant to section 102.69(d) and any party has moved for the production of any statement (as hereinafter defined) of such witness in possession of any agent of the Board which relates to the subject matter as to which the witness has testified. The authority exercised by the administrative law judge under subsection (b) of this section shall be exercised by the hearing officer presiding.

Officer could have easily chosen to discredit much of Rodriguez' testimony.[9]

The only other witness was one of Heath Tec's attorneys, Mr. Carlson, who testified to all the events leading up to the hearing in question. In particular, he testified to a conversation between himself and Agent Kaplan subsequent to Kaplan's investigation at Heath Tec's facilities. Carlson testified that immediately after the interviews Agent Kaplan stated, "There is no doubt that it [the rumor] is going around out there; that if the employees don't vote for the Union, they will be deported."

Following the testimony of the supervisor and the attorney, Heath Tec called as a witness Agent Kaplan for the purpose of directly establishing Region 20's knowledge of the deportation rumors. Counsel for Region 20 then offered petitions to revoke the subpoenas on behalf of Kaplan and Hoffman, which the Hearing Officer summarily granted. After argument and a short recess to reconsider the ruling, the Hearing Officer stated, "I do not have in my power the ability to compel the two subpoenaed individuals, with any additional information they have, to testify, based on Section 102.118 of the Rules and Regulations."

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[9] As this court said in *N.L.R.B. v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970):

> The examiner need not accept as true statements made by the [employer's] own witnesses, even if uncontradicted, and the examiner is entitled to make such a determination solely on the basis of his evaluation of the witnesses' demeanors. [Citations omitted.]

In *General Engineering, Inc. v. N.L.R.B.*, 341 F.2d 367 (9th Cir. 1965), this court held that in the absence of some valid evidentiary objection or privilege,[10] Rule 102.118 cannot be the basis for revocation of properly issued *subpoenas duces tecum*. That ruling was reaffirmed in *N.L.R.B. v. Seine and Line Fisherman's Union of San Pedro,* 374 F.2d 974 (9th Cir. 1967), *cert. denied,* 389 U.S. 913, 88 S.Ct. 239, 19 L.Ed.2d 261 (1967), and the court noted that the mere existence of Rule 102.118 by itself was not enough to create any recognized evidentiary privilege. 374 F.2d at 980. Even where, as in the present case, the General Counsel originally denied permission based on an established privilege, we are convinced that the Hearing Officer is required to make an *independent* evaluation of privilege before quashing a subpoena. *See Seine, supra,* 374 F.2d at 980-81. The Hearing Officer here made no such finding and thus was clearly in error.

However, we conclude that the error here, as in *Seine,* does not require remand. We are mindful of Section 706 of Title 5, U.S.C., which states that a court, on review of an administrative determination,

[10]The court suggested as possible objections
"evidence which is irrelevant or immaterial, or is privileged under some express statutory provision or under some rule of evidence cognizable in the federal district courts," and with respect to the privileges accorded governmental agencies such as the N.L.R.B., valid objections include "claims that the information sought would disclose confidential informants, state secrets, military secrets, or mental processes of those engaged in investigative or decisional functions." [Citations omitted.] *General Engineering, Inc. v. N.L.R.B.*, 341 F.2d 367, 374-75 (9th Cir. 1965).

should take due account of the rule of prejudicial error.

> Procedural irregularities are not per se prejudicial; each case must be determined on its individual facts . . . Moreover, "the burden of showing that prejudice has resulted" is on the party claiming injury from the erroneous rulings. [Citations omitted.] *Seine, supra,* 374 F.2d at 981.

Heath Tec has not met that burden here.

Heath Tec was well aware of the privilege of preserving the confidentiality of investigative files that had previously been asserted by the Board's General Counsel. Under such circumstances, therefore, it was incumbent upon Heath Tec to try to prove its case without resort to the privileged evidence.

From a review of the record, it is apparent that Carlson was at the Heath Tec facility while Kaplan interviewed between six and nine employees. Nonetheless, at the hearing on January 20th, the only employee Heath Tec called as a witness was Supervisor Rodriguez, whose testimony was sufficiently vague and contradictory that the Hearing Officer could have entirely discredited it. In fact, when asked at the hearing whether any other employees would be called to testify, counsel for Heath Tec declined even to discuss whom it had subpoenaed.

Having fallen far short of meeting its evidentiary burden through its own resources, Heath Tec *then* sought to call Agent Kaplan as a witness. Seeing how Heath Tec missed several opportunities to present a stronger case, we do not see how it can claim prejudice now. It appears that any prejudice to Heath Tec

resulted from its own presentation at the hearing—and not from the erroneous ruling—since there was no attempt on the part of Heath Tec first to meet its evidentiary needs on its own rather than having to rely on the privileged testimony.

Accordingly, we conclude that even though the Hearing Officer and the Board erroneously relied on 29 C.F.R. § 102.118 rather than an evidentiary objection or privilege, Heath Tec was not denied administrative due process, since it has not adequately shown that prejudice resulted directly from the error.

III

Heath Tec also contends that the Board incorrectly refused to set aside the election of April 19, 1974. Although it is true that the stated goals of the N.L.R.B. are to establish "laboratory conditions" for collective bargaining elections, this court has ruled that it will set aside an election only when the election process is "significantly impaired." *Heavenly Valley Ski Area v. N.L.R.B.*, 552 F.2d 269, 272 (9th Cir. 1977); *N.L.R.B. v. G. K. Turner Associates*, 457 F.2d 484, 487 (9th Cir. 1971). On the record presently before us, we cannot say that that there existed a significant impairment of the election process. Moreover, where the source of the questionable conduct is not the union or the employer—and there is no evidence of the source of the deportation rumors—the Board and courts are especially hesitant to set aside an election. *N.L.R.B. v. Sauk Valley Manufacturing Co., Inc.*, 486 F.2d 1127, 1131-32 (9th Cir. 1973).

As mentioned before, the testimony of Mr. Rodriguez and Mr. Carlson apparently was not sufficient to convince the Hearing Officer of the existence or detrimental effect of the alleged deportation rumors;[11] and upon a thorough examination of the record, we determine the Hearing Officer's conclusions not to be unreasonable. Since Heath Tec introduced no one else (e. g., an employee) to testify, and at that time did not offer an explanation therefor, the Officer and Board could have reasonably concluded that Heath Tec did not establish *prima facie* grounds for setting aside the election.

Had this court been called upon originally to pass on the merits of this argument, we might well have set aside the election, since the claims of Heath Tec, although not fully substantiated, certainly cast some doubt on the existence of true laboratory conditions at the plant. However, mere disagreement with the ultimate conclusion of the Board is not the standard for review.[12] In our opinion, the record does contain substantial evidence sufficient to sustain the Board's conclusion.

Accordingly, the petition is GRANTED, and the order of the Board will be ENFORCED.

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[11] *See* note 9 *supra*.

[12] A reviewing court may not

". . . displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951); *accord, Bayside Enterprises, Inc. v. N.L.R.B.*, 429 U.S. 298, 303, 97 S.Ct. 576, 581, 50 L.Ed.2d 494 (1977).

MERRILL, Circuit Judge, concurring:

I concur in Judge Neilsen's opinion but reach his part II result by a slightly different route. In my view the Hearing Officer was relieved of any duty to make an independent evaluation of privilege by Heath Tec's failure to attempt to meet its evidentiary needs without resort to privileged testimony. No showing of testimonal need on the part of Heath Tec having been made, there was nothing against which the Hearing Officer could weigh the importance of preserving the confidentiality of investigative files.

Appendix B

Before the National Labor Relations Board

Case 20-CA-10648

Heath Tec Division/San Francisco and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115.

[February 20, 1976]

DECISION AND ORDER

By Chairman Murphy and Members Jenkins and Walther

Upon a charge filed on September 18, 1975, by International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115, herein called the Union, and duly served on Heath Tec Division/San Francisco herein called the Respondent, the Acting General Counsel of the National Labor Relations Board, herein called General Counsel, by the Regional Director for Region 20, issued a complaint and amendment thereto on October 9 and 22, 1975, respectively, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section

2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and amendment thereto, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 28, 1975, following a Board election in Cases 20-RC-11425 and 20-RC-11428, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about September 17, 1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 29, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On November 28, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 10, 1975, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause

[1]Official notice is taken of the record in the representation proceeding, Cases 20-RC-11425 and 20-RC-11428, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause, entitled "Respondent's Answer To Notice To Show Cause and Request for Oral Argument."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding,[2] the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent in substance asserts the invalidity of the underlying certification based on its objections to the election conducted pursuant to a Stipulation for Certification Upon Consent Election. Further, Respondent contends that it was deprived of a fair hearing and due process by the Hearing Officer's revocation of *subpoenas duces tecum* directed to Board agents. In the Motion for Summary Judgment, counsel for the General Counsel in effect contends that Respondent is attempting to relitigate the representation case in this proceeding and this it may not do. We agree with the General Counsel.

The record herein, including that in the underlying representation proceeding, Cases 20-RC-11425 and

[2]The Respondent's request for oral argument is hereby denied as the positions of the parties are adequately set forth in their submissions in this matter, and in the representation proceeding.

20-RC-11428, establishes that on April 19, 1974, a second rerun election was held among all production and maintenance employees at Respondent's Hayward, California, facility.[3] The tally of ballots showed 10 votes cast for the Union, 7 against, and 4 challenged ballots. Respondent filed timely objections to the election alleging, in substance, Union and third person coercion by promises of benefits, by material misrepresentations, by threats to withhold benefits and to revoke the immigration papers of employees who did not support the Union, and by instructing ineligible persons to attempt to vote. Respondent's objections further alleged that, despite having conclusive knowledge of the deportation rumors and actual knowledge of the destruction of laboratory conditions by virtue of a Board investigation in Case 30-CB-3166 conducted 2 days before the election, the Board nevertheless conducted the election, thus depriving Respondent's employees of a fair and free election. After investigation of Respondent's objections, the Acting Regional Director on August

[3]On June 5, 1973, Metal Polishers, Buffers, Platers, and Helpers International Union, Local No. 128, herein called Metal Polishers, filed a petition in Case 20-RC-11425, and on June 7, 1973, the Union filed a petition in Case 20-RC-11428, seeking to represent the same employees sought by the Metal Polishers. On August 3, 1973, pursuant to a Stipulation for Certification Upon Consent Election, a Board election was held among Respondent's employees in the stipulated appropriate production and maintenance unit. The tally of ballots showed 10 votes for the Union, 1 for the Metal Polishers, 7 against the participating unions, and 2 challenged ballots. The Respondent filed timely objections to the election. On January 15, 1974, the Board set aside the election and ordered a rerun election. The Metal Polishers withdrew from the election, which was held on February 15, 1974. This rerun election was set aside by stipulation of the Respondent and Union.

21, 1974, issued a Report on Objections and Challenged Ballots, recommending that the objections be overruled in their entirety, that the Board order the opening of three of the four challenged ballots, and that the Union be certified if at least two of the ballots were cast for the Union.[4] Respondent filed exceptions to the report and a brief in support requesting a rerun election or a hearing. On December 16, 1974, the Board ordered a hearing only on those objections concerning the alleged threats with respect to the revocation of immigration papers by the Union and by third persons and on the objections alleging Board knowledge of deportation rumors and of the destruction of the laboratory conditions of the election.

Prior to the hearing, Respondent subpenaed Regional Director for Region 20, Roy O. Hoffman, and Board Agent Kaplan to appear at the hearing and also requested the General Counsel to give written consent allowing them to testify and present certain documents. The General Counsel denied Respondent's request and, at the hearing, the Hearing Offi-

[4]On April 18, 1974, the Union had filed an unfair labor practice charge in Case 20-CA-9120 alleging that Respondent herein violated Sec. 8(a)(1) and (3) of the Act by discriminatorily terminating three employees. By agreement of the parties, these three employees were allowed to vote under challenge. The Acting Regional Director found that, if even two of the challengd voters voted for the Union, then regardless of whether they were ultimately found to be eligible, the Union would have received a majority of the votes cast and would be entitled to be certified and she so recommended. Pending resolution of Case 20-CA-9120, the Acting Regional Director stated that she would make no recommendation with respect to the eligibility of the fourth challenged voter.

cer granted a petition to revoke the subpenas. After the hearing, Respondent filed its brief to the Hearing Officer. On March 17, 1975, the Hearing Officer issued his report and recommendations finding (1) insufficient evidence to establish that any agent of the Union made threats of deportation to employees or that there existed a general atmosphere of fear and reprisal sufficient to set aside the election; and (2) that the Regional Director did not have any knowledge of widespread deportation rumors or a lack of laboratory conditions necessary for a free and uncoerced election. Accordingly, he recommended that Respondent's objections be overruled and that the Union be certified if it should receive a majority after the challenged ballots were opened. Respondent filed timely exceptions to the Hearing Officer's report and a brief in support, reiterating its position with respect to the alleged threats of deportation, their impact on laboratory conditions, and the Region's alleged knowledge thereof. In addition, Respondent asserted that it was denied due process by suppression of evidence in that revocation of the subpenas deprived it of the only evidence as to the Region's knowledge of the alleged deportation threats. On July 30, 1975, after consideration of the Acting Regional Director's report, the Hearing Officer's report, and Respondent's exceptions and brief, the Board issued a Decision and Order directing the Regional Director to open and count ballots, adopting the findings, conclusions, and recommendations of the Acting Regional Director and Hearing Officer and directing the Regional Director to open and count the three challenged ballots

and to certify the Union if two or more of the challenged ballots were cast for the Union.

Thereafter, on August 22, 1975, the three challenged ballots were opened and counted and a revised tally issued showing 13 votes cast for the Union, 7 against, and 1 undetermined challenged ballot. On August 28, 1975, the Regional Director, absent objections, certified the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

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[5]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Findings of Fact

I. THE BUSINESS OF THE RESPONDENT

Respondent, a division of Heath Tec Corporation, a Washington corporation, with its principal place of business at Hayward, California, has been engaged in the business of anodizing, plating, and finishing of metals. During the past, year, in the course of its business operations, Respondent sold and shipped directly to customers located outside the State of California goods valued in excess of $50,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed at the Respondent's facility located in Hayward, California, including shipping and receiving employees, inspectors, and drivers; excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

2. The certification

On April 19, 1974, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 20, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on August 28, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 11, 1975, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 17, 1975, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since September 17, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.,* 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel,* 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company,* 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Heath Tec Division/San Francisco is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Respondent's facility located in Hayward, California, including shipping and receiving employees, inspectors, and drivers; excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 28, 1975, the above-named labor organization has been and now is the certified and

exclusive representative of all employers in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 17, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Heath Tev Division/San Francisco, Hayward, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and

conditions of employment with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed at the Respondent's facility located in Hayward, California, including shipping and receiving employees, inspectors, and drivers; excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Hayward, California, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional

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[6]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABER RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees employed at the Respondent's facility located in Hayward, California, including shipping and receiving employees, inspectors, and drivers; excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

HEATH TEC DIVISION/SAN FRANCISCO

Appendix C

PERTINENT PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 151 ET SEQ.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 9. (c)(1) Wherever a petition shall have filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the person filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot

receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

Appendix D

FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it make available or publishes an opinion, statement of policy, interpretation, or staff manual or

instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is

made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after serivce upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and

consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recomendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making

such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this

subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidiential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and the President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or

an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Appendix E

GOVERNMENT ORGANIZATION AND EMPLOYEES ACT, 5 U.S.C. § 301

5 U.S.C. § 301. Departmental regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379.

Appendix F

NATIONAL LABOR RELATIONS BOARD RULES AND REGULATIONS

29 C.F.R. Sec. 102.118 *Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum; prohibited from testifying in regard thereto; production of witnesses' statements after direct testimony.*—(a) (1) Except as provided in section 102.117 of these rules respecting requests cognizable under the Freedom of Information Act, no regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a *subpoena duces tecum* or otherwise, without the written consent of the Board or the chairman of the Board if the document is in Washington, D.C., and in control of the Board; or of the general counsel if the document is in a regional office of the agency or is in Washington, D.C., and in the control of the general counsel. Nor shall any such person testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia, or any subdivisions thereof, with respect to any information, facts, or other matter coming to his knowledge in his

official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or the general counsel, whether in answer to a subpoena or otherwise, without the written consent of the Board or the chairman of the Board if the person is in Washington, D.C., and subject to the supervision or control of the Board; or of the general counsel if the person is in a regional office of the agency or is in Washington, D.C., and subject to the supervision or control of the general counsel. A request that such consent be granted shall be in writing and shall identify the documents to be produced, or the person whose testimony is desired, the nature of the pending proceeding, and the purpose to be served by the production of the document or the testimony of the official. Whenever any *subpoena ad testificandum* or *subpoena duces tecum,* the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served on any such person or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule.

(2) No regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the Board, or other officer

or employee of the Board shall, by any means of communication to any person or to another agency, disclose personal information about an individual from a record in a system of records maintained by this agency, as more fully described in the notices of systems of records published by this agency in accordance with the provisions of section (e)(4) of the Privacy Act of 1974, 5 U.S.C. Sec. 552a (e)(4), or by the Notices of Government-wide Systems of Personnel Records published by the Civil Service Commission in accordance with those statutory provisions, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be in accordance with the provisions of section (b) (1) through (11), both inclusive, of the Privacy Act of 1974, 5 U.S.C. Sec. 552a (b) (1) through (11).

(b) (1) Notwithstanding the prohibitions of subsection (a) of this section, after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the administrative law judge shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

(2) If the general counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the administrative law judge shall order the general counsel to deliver such statement for the inspection of the administrative law judge *in camera*. Upon such delivery the administrative law judge shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness except that he may, in his discretion, decline to excise portions which, although not relating to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings. With such material excised the administrative law judge shall then direct delivery of such statement to the respondent for his use on cross-examination. If, pursuant to such procedure, any portion of such statement is withheld from the respondent and the respondent objects to such withholding, the entire text of such statement shall be preserved by the general counsel, and, in the event the respondent files exceptions with the Board based upon such withholding, shall be made available to the Board for the purpose of determining the correctness of the ruling of the administrative law judge. If the general counsel elects not to comply with an order of the administrative law judge directing delivery to the respondent of any such statement, or such portion thereof as the administrative law judge may direct, the administrative law judge shall strike from the record the testimony of the witness.

(c) The provisions of subsection (b) of this section shall also apply after any witness has testified in any postelection hearing pursuant to section 102.69(d) and any party has moved for the production of any statement (as hereinafter defined) of such witness in possession of any agent of the Board which relates to the subject matter as to which the witness has testified. The authority exercised by the administrative law judge under subsection (b) of this section shall be exercised by the hearing officer presiding.

(d) The term "statement" as used in subsections (b) and (c) of this section means: (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement.

Appendix G

NATIONAL LABOR RELATIONS BOARD'S STATEMENTS OF PROCEDURE

29 C.F.R. Sec. 101.20 *Formal hearing.*—(a) If no informal adjustment of the question concerning representation has been effected and it appears to the regional director that formal action is necessary, the regional director will institute formal proceedings by issuance of a notice of hearing on the issues, which is followed by a decision and direction of election or dismissal of the case. In certain types of cases, involving novel or complex issues, the regional director may submit the case for advice to the Board before issuing notice of hearing.

(b) The notice of hearing, together with a copy of the petition, is served on the unions and employer filing or named in the petition and on other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(c) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their

contentions. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

No. 77-1757

In the Supreme Court of the United States

OCTOBER TERM, 1978

HEATH TEC DIVISION/SAN FRANCISCO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 566 F.2d 1367. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 13-27) is reported at 222 NLRB 981. The Hearing Officer's Report and Recommendation (App., *infra*, pp. 1a-14a) adopted by the Board in the related representation proceeding is not officially reported.

JURISDICTION

The decision of the court of appeals was entered on January 5, 1978. A petition for rehearing *en banc* was denied on March 15, 1978, and the judgment of the court of appeals was entered on March 27, 1978. The petition for a writ of certiorari was filed on June 12, 1978.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the employer was denied due process in a hearing on its objections to a representation election when the hearing officer revoked subpoenas requiring production of privileged documents and testimony from Board personnel.

2. Whether, in the circumstances of this case, the Board properly rejected the employer's claim that the Regional Office had proceeded with the representation election knowing that laboratory conditions had been destroyed by rumors that employees would be deported unless they voted for the union.

STATUTORY PROVISIONS INVOLVED

Section 8(a) of the National Labor Relations Act, as amended (61 Stat. 140, 29 U.S.C. 158(a)), provides in relevant part:

[1] On July 5, 1978, Mr. Justice Rehnquist denied petitioner's motion to recall the mandate and stay the judgment of the court of appeals.

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. Pursuant to stipulations between petitioner Heath Tec (the Employer) and the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115 (the Union), a representation election was held on April 19, 1974, in a unit of production and maintenance workers in the Employer's plant in Hayward, California (Pet. App. 16).[2] The tally of ballots disclosed 10 votes for the Union, 7 against and 4 challenged ballots (Pet. App. 16, 17). The Employer filed 21 objections to the election, alleging, *inter alia*, that the Union and third persons had threatened employees with deportation unless they supported the Union and that the Board had conducted the election despite having knowledge that the requisite laboratory conditions for the election had been destroyed by the rumors of deportation. The Acting Regional Director investigated the objections

[2] Results of the two earlier elections had been set aside, the first on objections by the Employer and the second pursuant to a stipulation by the Employer and the Union (Pet. App. 16, n. 3).

and recommended that they be overruled in their entirety. She also recommended that three of the four challenged ballots be opened and that the Union be certified if at least two of these ballots were cast in favor of union representation (Pet. App. 16-17).

The Company filed exceptions and requested a new election or a hearing. On December 16, 1974, the Board ordered a hearing limited to the objections (Nos. 15-18) alleging threats and rumors of deportation and the Board's knowledge thereof (Pet. 5-6; Pet. App. 17). In connection with this hearing, the Employer served *subpoenas duces tecum* on the Board's Regional Director for Region 20 and on Edward Kaplan, the Board field agent who had conducted a preelection investigation of the claimed threats of deportation.[3] At the hearing, Board counsel moved for an order revoking the subpoenas since they directed the Board personnel to testify and produce documents from their investigative files.[4] The Hearing Officer,

[3] Prior to the election, the Employer had charged that the Union's participation in the alleged threats of deportation constituted unfair labor practices. The charge was investigated by field agent Kaplan and was dismissed by the Regional Director for lack of sufficient evidence on April 18, 1974, the day before the election. An appeal was denied on May 30, 1974 App., *infra*, pp. 5a-8a).

[4] Before serving the *subpoenas duces tecum* on Agent Kaplan and the Regional Director, the Employer had requested the General Counsel to authorize these persons to testify and produce documents from the Board's files (Pet. App. 17). The General Counsel denied the request by letter, referring to the confidentiality of investigative files, but stated that the denial did not "preclude an appropriate renewal of the request at the hearing where the necessity of the requested testimony can be established" (Board Exh. 10).

relying on Section 102.118 of the Board's Rules and Regulations, 29 C.F.R. 102.118 (Pet. App. 43-47), granted the motion to revoke the subpoenas. After the hearing was completed, the Hearing Officer issued a report recommending that the objections be overruled (App., *infra*, pp. 1a-14a).

The Employer filed exceptions to the Hearing Officer's report, reiterating its contentions with respect to deportation rumors and claiming additionally that the revocation of the *subpoenas duces tecum* constituted a denial of a fair hearing. On July 30, 1975, the Board denied the exceptions and adopted the findings and recommendation of the Acting Regional Director and the Hearing Officer (Pet. App. 18). Thereafter, the challenged ballots were talleyed and the final count showed 13 votes cast in favor of the Union, 7 against and 1 undetermined. The Union was certified on August 28, 1975 (Pet. App. 19).

In order to obtain judicial review of the Board's decision, the Employer refused to bargain with the Union (Pet. App. 3). The Board, finding that the Employer had thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act, entered a bargaining order (Pet. App. 13-26). The Employer appealed on the ground that its refusal to bargain was lawful because the election should have been set aside.

2. The court of appeals enforced the Board's order. The court held (Pet. App. 10) that the Employer was not denied a fair hearing by the revocation of the subpoenas because, even though the Hearing Officer had

erred in resting his ruling solely on the Board's regulation, the Employer had not made an adequate showing of prejudice. The court observed (Pet. App. 9-10) that "any prejudice to Heath Tec resulted from its own presentation at the hearing—and not from the erroneous ruling—since there was no attempt on the part of Heath Tec first to meet its evidentiary needs on its own rather than having to rely on privileged testimony." With regard to the claim that laboratory conditions were significantly impaired by the claimed rumors and threats of deportation, the court held (Pet. App. 10-11) that the source of the rumors was not shown and that, on the record before it, the Board "could have reasonably concluded that Heath Tec did not establish *prima facie* grounds for setting aside the election."

ARGUMENT

1. The court of appeals correctly held that the testimony and documents sought by the Employer were privileged and that the Employer failed to make an adequate showing of need to overcome that privilege (Pet. App. 9). Accordingly, even if the Hearing Officer erred in relying solely on the Board's rule,[5] the subpoenas were nonetheless properly revoked.

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[5] Since reliance on the Board's rule is immaterial, the Employer's contentions (Pet. 16-17) with respect to 5 U.S.C. 301 would be irrelevant even if that provision, which governs regulations issued by the "head of an Executive department or military department," applied to independent agencies such as the Board.

As the Employer concedes (Pet. 12-13, 19), it was seeking to obtain the testimony of the Regional Director and Board Agent Kaplan to establish what was in their minds when they were investigating and considering the merits of the Employer's unfair labor practice charge concerning alleged deportation threats by union agents. The Employer was also seeking "witness statements [and] interview notes and opinions of the Regional Office of the Board concerning the decision" to dismiss the charge (*id.* at 19). As the court of appeals noted (Pet. App. 5-6), the General Counsel invoked "the recognized privilege of preserving the confidentiality of investigative files" in denying the Employer's request that the specified witnesses and files be made available. See note 4, *supra*. See also *Stephens Produce Co., Inc.* v. *National Labor Relations Board*, 515 F.2d 1373, 1376 (C.A. 8); *J. H. Rutter Rex Manufacturing Co., Inc.* v. *National Labor Relations Board*, 473 F.2d 223, 231 (C.A. 5), certiorari denied, 414 U.S. 822. The materials requested by the Employer were protected not only by the privilege of confidentiality for investigative files, but also by the privilege of confidentiality for the deliberative processes of agency decisionmakers. See *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184; *Morgan* v. *United States*, 304 U.S. 1, 18; *Kent Corp.* v. *National Labor Relations Board*, 530 F.2d 612, 618-621 (C.A. 5), certiorari denied, 429 U.S. 920.[6]

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[6] *Grumman*, *supra*, and *Kent*, *supra*, are cases originally brought in federal district courts under the Freedom of In-

The Employer implicitly contends, however (Pet. 12-15), that it overcame any privilege by making an adequate showing of need for the information even though it failed to call any employee witnesses to support its objections. Specifically, the Employer contends (1) that employee witnesses could have provided only hearsay evidence regarding Objections 17 and 18 which alleged that the Board had improperly con-

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formation Act (FOIA), as amended, 5 U.S.C. 552. These cases discuss traditional evidentiary privileges incorporated in FOIA exemptions. The present case, by contrast, is here following appellate review of a Board proceeding under Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e). The two statutory schemes are independent, and the Employer's FOIA claim (Pet. 17-19) is not properly presented in this proceeding. See *United States* v. *Murdock*, 548 F.2d 599, 602 (C.A. 5). Nor would the FOIA in any way buttress the Employer's claim that the denial of the discovery it sought constituted a denial of due process, for "[n]othing new by way of due process emerged with the FOIA," nor was it intended to serve as a discovery tool for litigants. *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 22, 24. Accord: *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, No. 77-911, decided June 15, 1978. Even if a FOIA claim were properly presented, the Act clearly would not apply to any of the testimony sought. Moreover, the documents sought by the Employer in connection with the ongoing Board proceeding would fall within Exemptions 5 and 7(A) of the FOIA. See *National Labor Relations Board* v. *Robbins Tire & Rubber Co., supra* (witness affidavits in unfair labor practice proceeding); *New England Medical Center Hospital* v. *National Labor Relations Board*, 548 F.2d 377 (C.A. 1) (documents in "closed" file related to pending unfair labor practice proceeding); *Kent Corp.* v. *National Labor Relations Board, supra* (final investigation reports pertaining to dismissed unfair labor practice charges).

ducted the representation election after gaining actual knowledge that laboratory conditions had been destroyed by widespread circulation of deportation rumors, and (2) that it was prevented from questioning its employees on this subject because it would thereby be committing an unfair labor practice under the doctrine established in *Johnnie's Poultry Co.*, 146 NLRB 770, enforcement denied on other grounds, 344 F. 2d 617 (C.A. 8). These contentions are without merit.

In order to establish the facts alleged in Objections 17 and 18, it would be essential first to establish that laboratory conditions had in fact been destroyed. If laboratory conditions had not been destroyed, then the Board could not have had "actual knowledge" of such a circumstance. The primary source of information on this subject would be the plant employees. The employees would know, among other things, what the rumors were, who had circulated them, who had heard them, and whether those who had heard them were in fact aliens without proper immigration papers and thus likely to be affected by such rumors. Of course, if employee testimony on these matters established that laboratory conditions had actually been destroyed, this testimony alone would warrant setting aside the election; evidence of Board knowledge prior to the election would then be superfluous. Thus, only if the employees were unavailable to testify would any evidence in the Board's files be needed. The Employer, however, made no showing that it was unable to subpoena employees likely to have knowledge on the sub-

ject. Indeed, as the court of appeals noted (Pet. App. 9), the Employer had provided from six to nine employees to Board agents for interviews at the plant regarding the Employer's unfair labor practice charge, and therefore had reason to know who would have relevant information.[7]

Contrary to its contention (Pet. 12-13), the Employer would not have "run afoul" of the rule in *Johnnie's Poultry Co.*, *supra*, had it sought to establish its case through questioning its employees. The crucial fact for the employer to have established was not whether employees had given statements to the Board but what the employees knew about the alleged deportation rumors. *Johnnie's Poultry Co.* is no bar to such questioning, for it holds only that, when an employer interviews its employees in connection with unfair labor practice proceedings, it must communicate to the employees the purpose of the questioning, assure them that no reprisals will take place, and obtain their participation on a voluntary basis. 146 NLRB at 775.

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[7] This case is therefore distinguishable from *Firestone Synthetic Fibers Co.* v. *National Labor Relations Board*, 374 F. 2d 211 (C.A. 4), relied on by the Employer (Pet. 11). In that case, the court held that the General Counsel's burden of proof to establish a Section 8(a)(1) violation might be greater than usual where he declined to identify or call certain witnesses who were present at the incident in question and who could either corroborate or contradict the charging party's testimony. The court observed that the employer could not call the witnesses because it was unaware of their identity. *Id.* at 214.

In sum, the court of appeals properly held that the Employer was not denied due process or a fair hearing. Any prejudice to the Employer's case stemmed from its own failure to avail itself of nonprivileged evidence and not from the revocation of its subpoenas for privileged evidence from Board files and Board personnel.

2. The Board did not abuse its discretion in declining to set aside the representation election on the basis of the Employer's claim, in Objections 17 and 18, that the election was improperly held at a time when Board personnel knew that laboratory conditions had been destroyed by deportation rumors. Where, as in this case, there is no showing that any party to the election was responsible for the allegedly coercive conduct, the Board will set aside the election only if the conduct is shown to have created an atmosphere of fear and reprisal that precludes employees from freely expressing their choice. *National Labor Relations Board* v. *Bostik Division, USM Corp.*, 517 F.2d 971, 973-975 (C.A. 6); *National Labor Relations Board* v. *Staub Cleaners, Inc.*, 418 F.2d 1086, 1088 (C.A. 2), certiorari denied, 397 U.S. 1038; *Intertype Co.* v. *National Labor Relations Board*, 401 F.2d 41, 45-46 (C.A. 4), certiorari denied, 393 U.S. 1049. Since the evidence presented by the Employer in this case failed to establish that rumors had been circulated among employees who had any reason to fear deportation or that there was, for any other reason, an atmosphere of fear and reprisal, the Board

was warranted in overruling the Employer's objections.[8] Further review of this factual question in this Court is unnecessary.

The Employer's reliance (Pet. 21) on cases where the misconduct of Board personnel casts doubt on the existence of laboratory conditions is misplaced. The only facts alleged in support of its contention that there was such misconduct here are (1) that Board Agent Kaplan remarked, after investigating the Employer's unfair labor practice charge, that there was "no doubt" that a deportation rumor was "going around" in the plant, although the rumor could not be connected to Union agents (Pet. 4-5); and (2) that the Regional Office thereafter dismissed the unfair labor practice charge and denied the Employer's request for a postponement of the election (Pet. 5). Board Agent Kaplan's remark indicated, however, only that he believed that a deportation rumor was circulating—not that he believed laboratory conditions had been destroyed. Moreover, the Board assured that the rights of all parties to a fair election were protected by following standard procedure in considering the objections filed in the post-election proceedings. There is nothing in this sequence of events that could reasonably be characterized as misconduct—let alone the type of misconduct involved in the cases on which

[8] The Employer's evidence was limited to the vague and conflicting hearsay testimony of its plant manager and one of its attorneys (App., *infra*, pp. 4a-12a; Tr. 8-71, 72-129).

the Employer relies.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ELINOR HADLEY STILLMAN,
Attorney,
National Labor Relations Board.

AUGUST 1978.

[9] *Provincial House, Inc.* v. *National Labor Relations Board*, 568 F.2d 8, 11 (C.A. 6), concerned a Board agent who went to a restaurant meeting room to take employee affidavits in an unfair labor practice investigation and ended up by becoming "a part of [a] union organizing meeting." In *Delta Drilling Co.* v. *National Labor Relations Board*, 406 F.2d 109 (C.A. 5), a Board agent spent time in a union agent's room, as a stopover on his trip from one election polling place to another. *National Labor Relations Board* v. *Bata Shoe Co.*, 377 F.2d 821 (C.A. 4), certiorari denied, 389 U.S. 917, involved substantial procedural irregularities that allowed employees who lined up after the polls closed to vote while permission to some who arrived on time was denied. Finally, in *Glacier Packing Co., Inc.*, 210 NLRB 571, the Board agent ripped off badges worn by the employer's election observers and generally behaved in a manner suggesting "that the Board was opposed to the Employer's position in the election." *Id.* at 573.

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Region 20

Case No. 20-RC-11428

HEATH TEC FINISHES DIVISION/SAN FRANCISCO
EMPLOYER

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115
PETITIONER

Harry Finkle, Esquire of San Francisco, California,
for the Employer

Robert J. Carter, Grand Lodge Representation of
Hayward, California, for the Petitioner

Marian Kennedy Pollack, Esquire of San Francisco,
California, for the Regional Office, Region 20

Before: *Tony Bisceglia*, Hearing Officer.

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

Pursuant to a stipulation of the parties, a second rerun election by secret ballot was conducted on

April 19,[1] under the direction and supervision of the Regional Director for Region 20 in a unit of all production and maintenance employees employed at the Employer's facility in Hayward, California including shipping and receiving employees, inspectors and drivers; excluding office clerical employees, professional employees, salesmen and guards and supervisors as defined in the Act.

Upon the conclusion of the second rerun election, each party was furnished with a tally of ballot which showed that of approximately 21 eligible voters, 10 cast ballots for and 7 cast ballots against the Petitioner and 4 ballots were challenged. The challenged ballots are sufficient in number to affect the results of the election and timely objections to the election were filed by the Employer.

On August 21, 1974, the Acting Regional Director for Region 20 issued her Report on Objections and Challenged Ballots recommending that the objections be overruled in their entirety and that certain challenged ballots be opened.

On December 16, 1974, the Board issued an Order Directing Hearing for the purpose of receiving evidence to resolve the issues raised by Employer's Objections 15, 16, 17 and 18.

This matter was heard at San Francisco, California, on January 20, 1975, pursuant to the above-referenced Order Directing Hearing and a Notice of Hearing issued by the Regional Director for Region 20 on January 2, 1975.

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[1] All dates are 1974 unless otherwise specified.

The objections in their entirety are as follows:

15. The Union by its representatives, agents, and/or persons closely allied therewith acting with the consent and/or approval of the Union, coerced, threatened and intimidated Spanish-speaking employees of the Employer by representing to said employees that unless said employees supported the Union and voted for the Union in the election that the Union and/or its agents would harass the employees by having their immigration papers revoked with the consequence that they would lose their employment and be expelled from the United States.

16. Third persons coerced, threatened and intimidated Spanish-speaking employees of the Employer by representing to said employees that unless said employees supported the Union and voted for the Union in the election that the Union and/or its agents would harass the employees by having their immigration papers revoked with the consequence that they would lose their employment and be expelled from the United States with the consequence that necessary and essential laboratory conditions were destroyed.

17. The National Labor Relations Board with conclusive knowledge, resulting from an NLRB investigation at the Employer's premises and in which employees were interviewed by NLRB agents, that rumors were widespread among the employees that unless the employees voted for the Union their immigration papers would be examined and they would bze expelled from

the United States, proceeded to conduct the representation election thereby interferring with the election process and the rights of employees to a fair and free election conducted in an atmosphere free from coercion, threats and intimidation.

18. The National Labor Relations Board had actual knowledge, received through an NLRB investigation at the Employer's facility and from employee interviews conducted by NLRB agents, that the necessary laboratory conditions essential to a valid representation election were not present, but completely destroyed at the Employer's facility. With such knowledge, the National Labor Relations Board proceeded to conduct a representation election thereby depriving employees of a fair and free election conducted in an atmosphere free from coercion, threats and intimidation.

All parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to present evidence pertinent to the issues, and to argue orally at the conclusion of the taking of evidence.

Upon the entire record of the hearing and from my observation of the witnesses, I make the following findings of fact, conclusions and recommendation:

FINDINGS OF FACT

Esequiel Rodriquez, a supervisor, testified[2] that about one or two weeks before the election conducted

[2] Rodriquez, although not very articulate, initially answered questions without the aid of an interpreter. As the questions became more complex, the parties agreed to the use of an interpreter. After the interpreter arrived the parties were allowed to re-ask, through the interpreter, any questions previously asked. I am satisfied that the witness understood all questions which he answered prior to the arrival of the interpreter.

by the Board on April 19, Felipe, whose last name was unknown to the witness, talked to a group of about two to four employees in the plant for about two or three minutes. Rodriquez testified that Felipe told the employees that if they didn't vote for the Union immigration would come into the plant to take somebody. Rodriquez did not participate in this conversation, but was standing four or five feet away. Rodriquez does not recall the names of the employees, nor does he recall anything else that Felipe said. Further, Rodriquez does not recall the reaction, if any, of the employees, does not know if the employees had proper immigration papers, and did not hear the employees say anything to Felipe.

Rodriquez also testified that an employee whose name he does not recall told him about a week or two before the April 19 election that employee Wolfrano Ruiz told this unnamed employee that someone would bring in immigration if the employees didn't vote for the Union. Rodriquez testified that the unnamed employee did not tell him when Ruiz allegedly made the statement. Ruiz was terminated approximately one month prior to the April 19 election. An affidavit taken from Rodriquez on April 17 by Board Agent Edward Kaplan from Region 20 of the Board was introduced as evidence at the hearing. Rodriquez

testified that Kaplan read the statement to him in English, that his supervisor, Garcia, read, in Spanish, the parts of the affidavit that he did not understand in English. Rodriquez states in his affidavit, "I do not recall any employees by name who mentioned that anyone not having proper papers or who did not vote for the Union would be deported." Rodriquez testified that he recalled making the above statement to Kaplan. He further testified that he told Kaplan the truth, but that some of the statements made at this hearing were not made to Kaplan at the time the affidavit was taken because Kaplan did not ask him those questions.

I find it inconceivable that Rodriquez would recall approximately nine months after the April 19 election that Felips told other employees that if they did not vote for the Union the immigration would come, when in a sworn statement given to the Board less than two weeks after the alleged statement made by Felipe, he testified that he did not recall by name any employees who said that anyone not voting for the Union would be deported.[3] Moreover, Rodriquez' testimony at the hearing was extremely vague in so far as his recollection of what Felipe had said. Additionally, he could not recall the reaction or response of the unnamed employees to whom Felipe was allegedly speaking. From my observation of Rodriquez' demeanor on

[3] I am satisfied that the words "immigration" and "deportation", as used in the context of Rodriquez' affidavit and testimony at the hearing, have the same connotation and that the witness did not believe that they had different meanings.

the witness stand and the record as a whole, I credit Rodriquez only to the extent that his testimony was not contradicted by the above-mentioned part of his April 17 affidavit.

I am not discrediting Rodriquez with respect to his testimony about Ruiz since there is nothing inconsistent between the above-mentioned statement from Rodriquez' April 17 affidavit and his testimony as to what Ruiz allegedly told the unnamed employee. It is possible that this heresay statement may not have been included in the April 17 affidavit.

The Employer's only other witness was Alan B. Carlson, an attorney with the law firm of Littler, Mendelson and Fastiff. This firm has represented the Employer throughout the entire representation proceedings. Carlson testified that on April 12, he filed a charge against the Petitioner alleging a violation of Section 8(b)(1)(A)[4] of the Act. The charge alleged, in pertinent part,

> "Since on or about March 1, 1974, the Union by its representatives, agents, and/or persons closely allied therewith acting with the consent and/or approval of the Union, have coerced, threatened and intimidated Spanish-speaking employees of the Employer by representing to them that unless they support and join, and pay initiation fees and monthly dues to the Union, the Union or its agents will harass them by having

[4] While testifying Carlson incorrectly referred to the charge as a charge alleging a violation of Section 8(a)(1). It is clear from the record that he meant Section 8(b)(1)(A).

the employees' work permits revoked, and by acting to have the employees stripped of their jobs and expelled from the United States."

This charge against the Petitioner was dismissed on April 18. The Region's dismissal letter recites insufficient evidence to conclude that there was a violation as the basis for the dismissal. The Employer's appeal to the dismissal was denied on May 30.

Carlson testified that on April 17 he met Kaplan and another Board Agent at the Employer's premises for the purpose of providing witnesses to substantiate the unfair labor practice charge. Carlson estimates that five to eight employees plus Rodriquez were provided to the Board Agents for this purpose and that the Board Agents interviewed all witnesses in private. Carlson received a copy of supervisor Rodriquez' affidavit, but did not receive copies of any of the affidavits taken from employees. Carlson testified that after both Board Agents finished interviewing the witnesses, he asked Kaplan if he found anything during the course of his investigation. According to Carlson, Kaplan replied, "It is going around out there. That is, the people who do not vote for the Union, that they would be deported. I am having trouble connecting it to the Union." Carlson then told Kaplan that his statement pertained to the unfair labor practice charge, but not necessarily whether an election should be held.

Carlson testified that on April 18, Kaplan again told him the rumor was going around at the plant that if the people did not vote for the Union they would be

deported, but that the Board did not have enough evidence to connect it to the Union. Carlson also testified that on April 17 and 18, he sent letters to Roy O. Hoffman, Regional Director of Region 20, asking that the election scheduled for April 19 be postponed due to the Petitioner's conduct. In addition, Carlson testified that on April 17, the Petitioner filed an unfair labor practice charge against the Employer, alleging that Wolfrano Ruiz, among others, was terminated because of his union activities. Carlson reasoned in his April 18 letter to Hoffman and at the hearing that since it was alleged by the Petitioner that Ruiz had engaged in Union activities, perhaps this would establish a connecting link between the Union and the statements going around the plant.

Both Hoffman and Kaplan were subpoenaed to appear at the hearing. The Employer made a request to Peter G. Mash, General Counsel of the National Labor Relations Board, to give written consent allowing Hoffman and Kaplan to testify and present certain documents. By letter, the General Counsel denied the Employer's request, but stated that the denial did not preclude the renewal of the request at the hearing in circumstances where the necessity of the requested testimony could be established. The Regional Office Representative presented a Petition to Revoke at the hearing. Although the Employer renewed his request for the testimony of Hoffman and Kaplan at the hearing, the Petition to Revoke was granted based on Section 102.11S of the Board's Rules and Regulations. A Hearing Officer does not have the authority to com-

pel a Regional Director or Board Agent to testify and present documents without the express permission of the General Counsel or the Board.

ANALYSIS AND CONCLUSIONS

Objection No. 15:

Carlson was the only witness at the hearing who presented evidence pertaining to the agency status of any individual making statements to employees. In this regard Carlson testified that in an unfair labor practice charge filed against the Employer it was alleged that Ruiz had participated in union activities. Carlson reasoned that Ruiz' alleged participation in union activities coupled with the statement he allegedly made to the unnamed employee would establish a link between the Union and the statement. Assuming, *arguendo*, that Ruiz had engaged in union activities, the mere fact that an employee is prominent in an organizing campaign does not establish that the employee is acting as an agent of the Petitioner.[5] I find that there is insufficient evidence to establish that any representatives or agents of the Petitioner or persons closely allied with the Petitioner made any statements to any employees.

Objection No. 16:

While the Board will consider conduct not attributable to any of the parties in determining whether an

[5] *Owens-Corning Fiberglas Corporation*, 179 NLRB 219; *Electric Wheel Company*, 120 NLRB 1644.

election should be set aside, the Board accords less weight to such conduct than to the conduct of the parties.[6] The test to be applied in determining whether an election wil be set aside on the basis of conduct not attributable to one of the parties is whether the character of the conduct was so grievous as to create a general atmosphere of fear and reprisal rendering a free expression of choice impossible.[7]

The gravamen of the Employer's brief submitted in this matter is that an election conducted in an atmosphere of confusion, anxiety, coercion, threats of violence and personal retaliation, fear of reprisal and actual violence, should be set aside. Several cases are cited which are pertinent when the above conditions exist at the time of the election. However, I do not find that the above conditions existed prior to the April 19 election.

On the basis of the credited evidence, there were only two facts brought out that pertain to this objection. The first is that an unnamed employee told Rodriquez, a supervisor, that Ruiz, an employee, had said that immigration would come in if employees did not vote for the Union. Rodriquez was not told when Ruiz allegedly made the statement. The second fact is that after the Board Agents interviewed five to eight employee witnesses, and Rodriquez, he informed Carlson that deportation rumors were going around

[6] *Orleans Manufacturing Company*, 120 NLRB 630.

[7] *Central Photocolor Company, Incorporated*, 195 NLRB 839.

in the plant. There was no evidence presented at the hearing that would indicate that any of the employees had any reason to fear the statement allegedly made by Ruiz or had any reason to fear the alleged rumors. There was no evidence that Rodriquez informed any employees of the statement allegedly made by Ruiz. No employee witnesses were presented at the hearing. (Moreover, Counsel for the Regional Office, whose primary function is to see that evidence adduced during the Region's investigation becomes part of the record, proffered no evidence pertaining to what employees were told.)

The burden is on the Objecting Party to show that there has been prejudice to the fairness of the election.[8] This burden has not been met by the Employer. The only testimony provided on this objection was hearsay. Without direct evidence pertaining to what employees were actually told by other employees or third persons, I am unable to find that a general atmosphere of fear and reprisal existed that would be sufficient to set aside the election.

Objection Nos. 17 and 18:

These objections are based on Kaplan's statements to Carlson that deportation rumors were going around at the plant. Other than Carlson's testimony pertaining to what Kaplan said, there was no testimony or evidence presented at the hearing that Region 20 had actual and/or conclusive knowledge that there were

[8] *N.L.R.B.* v. *Golden Age Beverage Co.*, 415 F. 2d 26.

widespread rumors of deportation and/or that the necessary laboratory conditions for a fair and free election did not exist. It appears that, until this hearing, Region 20 had no knowledge of Rodriquez' statements, made at the hearing, pertaining to Ruiz and Felipe since no mention of the two incidents were made in the affidavit given to Kaplan by Rodriquez. Although it appears from Carlson's testimony that Kaplan was of the opinion that there were certain deportation rumors circulating at the plant, this opinion does not necessarily reflect the opinion of the Regional Director. A statement or commitment by a Board Agent during the course of an investigation does not necessarily indicate that the Regional Director is in concurrence with the statement or commitment.[9] Moreover, the rights of the parties are protected by post election objection procedures as provided in Section 102.69 of the Board's Rules and Regulations. The Regional Director is not precluded from conducting an election particularly where, as here, the only possible way to remedy objectionable conduct by any of the parties is through the filing of objections to such conduct *after the election has been held.*

Based on the above analysis, Carlson's testimony and the record as a whole, I do not find that the Regional Director, prior to the election, had any

[9] See *Zimnox Coal Company*, 140 NLRB 1229; *United Association of Journeymen, Local 106, (Columbia-Southern Chemical Corporation)*, 110 NLRB 206; and *Milwaukee Nash Company*, 105 NLRB 684.

knowledge of widespread deportation rumors or a lack of the laboratory conditions necessary for a free and uncoerced election. Moreover, I find that the Regional Director properly conducted the election on April 19.

RECOMMENDATION

Upon the foregoing facts, analysis and conclusions, the undersigned recommends that the Board overrule the Employer's Objections 15, 16, 17 and 18 and that if, after opening the challenged ballots, the Petitioner receives a majority of the ballots cast, the Petitioner be certified as the bargaining representative.[10]

Dated at Los Angeles, California this 17th day of March 1975.

/s/ Tony Bisceglia
TONY BISCEGLIA
Hearing Officer
National Labor Relations Board
Region 31
12th Floor, Federal Building
11000 Wilshire Boulevard
Los Angeles, California 90024

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[10] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Such exceptions must be received by the Board in Washington by March 31, 1975.

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